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IN THE

Supreme Court of the United States

October Term, 1952.

No. 754

LOUIS POLLOCK, *Petitioner*

vs.

[redacted]

United States of America, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

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No. .....

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United States of America, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

PETITION

The Petitioner, Louis Pollock, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (R. 516, 526) entered in the above entitled cause on February 27, 1953. The Judgment of the said Circuit Court of Appeals became final on March 30, 1953, on which date Petition for Rehearing (R. 528) was denied (533).

1.

JURISDICTION

The jurisdiction of this court is invoked under Title 28 Section 1254 (1) U.S.C.A. Chap. 646, 62 Stat. 928.

2.

STATEMENT

The petitioner, defendant, Louis Pollock, was indicted on the 13th day of April, A. D. 1951, in the District Court of the United States for the Northern District of Alabama, Southern Division, on two counts for wilfully and knowingly attempting to defeat and evade a large part of the income taxes due and owing by him and his wife to the United States for the calendar year 1944 and the calendar year 1945. The indictment was drawn under 26 U.S.C. 145(b), (R. 1-3). The defendant entered a plea of not guilty to both counts of the indictment and the case was subsequently tried. (R. 4). On May 20, 1952, the jury found the defendant guilty as charged in the indictment. Judgment by the court was entered on the 21st day of May, 1952, finding that the defendant was guilty as charged, and convicted (R. 10-11).

On appeal, the United States Court of Appeals (5th Circuit) made the following findings of fact in its opinion (R. 517-518) which findings your petitioner deems to be correct:

> "Previous to 1944, appellant and his wife had made their income tax returns on a calendar year basis. In August of 1943, the appellant purchased the Dothan Jewelry Company, and thereafter operated that company throughout the years 1944 and 1945. He did not include any of the income from that company in his 1943 tax return. Notwithstanding that company was owned soley by the appellant, he mistakenly informed his accountants that it was

> a partnership in which he owned a two-thirds interest and his son, R. E. Pollock, a one-third interest. The government at no time has sought to impute any fraudulent purpose to that mistake, but has treated it as having been made in good faith. Acting upon the erroneous assumption of a partnership, the books of the Dothan Jewelry Company were kept upon a fiscal year basis for fiscal years ending July 31, 1944 and July 31, 1945. The income tax returns of appellant and his wife purported to be for the calendar years 1944 and 1945 and were filed on March 15th of the succeeding year, but exhibits attached to the returns showed that as to the Dothan Jewelry Company, the net profit was calculated for a fiscal year ending July 31st. *The resulting confusion and uncertainty* has given rise to several of the appellant's contentions. (Italics ours).

In auditing the Petitioner's returns for the calendar years 1944 and 1945, the examining officers of the Bureau of Internal Revenue accepted the profits of the Dothan Jewelry Company as reported, on a fiscal year basis and added to these profits additional income as earned on a calendar year basis. (R. 402, 403.)

In determining the additional income for the calendar years 1944 and 1945 against petitioner, the examining officers of the Bureau of Internal Revenue, gave to the petitioner no credit for the year 1943 income, which the petitioner had reported in 1944, nor credit for 1944 income which the petitioner had reported in 1945. (R. 385, 388, 389, 402, 403).

As found by the court below (R 517-518) the books of petitioner's business, Dothan Jewelry Company, were kept on a fiscal year basis. He nevertheless through his certified public accountants, filed a calendar year return, and the examining officers of the Bureau of Internal Revenue computed the income against him on calendar year basis as hereinabove set forth.

Several months after the filing of the first indictment against your petitioner (R. 1-3) the United States obtained a second indictment against your petitioner which charged that the petitioner did knowingly and wilfully attempt to defeat and evade a part of his Federal income taxes for the fiscal year ending July 31, 1945 (R. 14).

After his conviction, the petitioner filed notice of appeal to the United States Court of Appeals, Fifth Circuit (R. 489), a statement of points on appeal (R. 493), and a full transcript of the record on appeal. In the opinion, promulgated on February 27, 1953 (R. 516-526) the Court below affirmed the judgment of the United States District Court for the Northern District of Alabama. Thereafter the petitioner, on March 17, 1953, filed a Petition for Rehearing (R. 528-532). On the 30th day of March, 1953, the Court below denied the petition for rehearing (R. 533), and granted a stay of mandate for thirty days.

3.

QUESTIONS PRESENTED

I.

Whether the indictment dated April 13, 1951 (R. 1-3) was completely invalid as a matter of law because the books and records of petitioner's business were kept on a fiscal year basis, July 31 to August 1st, and the alleged understatement of income was computed on the calendar year basis for the years 1944 and 1945, contrary to the fiscal year basis used by petitioner in keeping his books and records.

II.

Whether the Court of Appeals erred in affirming the decision of the Honorable Judge of the District Court in

refusing to give to the jury Instructions VIII, IX and X requested by petitioner (R. 479, 480) as follows:

> VIII. "If you find that the United States has included in the defendant's taxable income for the calendar year 1944, monies paid to the defendant during the calendar year of 1943, then you must find that the computation of the United States as to the defendant's net income for the Calendar year 1944 was erroneous, and you must acquit him under Count One of the Indictment."
>
> IX. "If you find that the United States has included in the defendant's taxable income for the calendar year 1945, monies paid to the defendant during the calendar year 1944, then you must find that the computation of the United States as to defendant's net income for the calendar year 1945 was erroneous and you must acquit him under Count Two of the Indictment."
>
> X. "If you find that the defendant regularly kept his books and records on a fiscal year basis, ending July 31 for the years 1944 and 1945, but filed his Federal income tax returns for the years 1944 and 1945 on a calendar year basis, then the United States, the authorized representatives of the United States, and/or the Commissioner of Internal Revenue of the United States was without authority to compute defendant's net income or determine a deficiency in Federal income tax for the calendar years 1944 and 1945 and you must acquit him."

III.

Whether the Court of Appeals erred in affirming the decision of the District Court in refusing the Petitioner's Motions for judgment of acquital as to both counts 1 and 2 of the indictment, (R. 444, 467, 483-485).

IV.

Whether the Trial Court erred by disregarding the Petitioner's privilege against self-incrimination by admitting in evidence copies of petitioner's receipts and papers

in possession of his attorney, Milton Weiss, (R. 124-127).

V.

Whether the District Court erred by failing to sustain Petitioner's motions for judgment of acquital with respect to Count 1 of the Indictment in view of the fact the testimony of the respondent herein demonstrated that on the net worth basis of computation the petitioner had over-reported his 1944 income by the sum of $8,565.01.

VI.

Whether both the District Court and the Court of Appeals erred in failing to hold and decide that Count 1 of the Indictment relating to the year 1944, was barred by the Statute of Limitations.

4.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The Court of Appeals erred by failing to decide that the indictment (R. 1-3) covering the calendar years 1944 and 1945, was completely invalid as a matter of law because the books and records of the petitioner's business were kept on a fiscal year basis and the alleged understatement of tax was computed on the calendar year basis.

This issue involved an important question of Federal tax law. The decision of the court below is in direct conflict with the decision of the United States Court of Appeals, Second Circuit, in *Brooklyn City Railroad Company* vs. *Commissioner of Internal Revenue* 72 F. 2nd, 274, affirming Brooklyn City Railroad Company vs. Commissioner, 27 B.T.A. 777.

In the Brooklyn City Railroad Company case, both the United States Board of Tax Appeals, and the Circuit Court of Appeals held that,

> "Where the taxpayer for many years prior and subsequent to 1921 regularly kept its books of account on the basis of a fiscal year ended June 30, although it made its tax return on the basis of the calendar year, *the Commissioner was without authority to compute net income, or to determine a consequent deficiency in tax, for the calendar year 1921.*" (Italics ours)

The decision of the court below is also contrary to and in conflict with the decision of the Court of Appeals (C.C.A. 8) in *Great West Printing Co.*, 60 F. 2nd, 749, affirming 22 B.T.A. 346.

The Court below refused to follow the cases of *Brooklyn City Railroad Company* vs. *Commissioner, supra; Great West Printing Co.* vs. *Commissioner, supra,* and *Charles E. Hires* vs. *Commissioner,* 26 B.T.A. 1351, and other cases, apparently on the ground that these cases involved civil tax liability rather than criminal tax liability (R. 518). The Court below did not challenge the correctness of these decisions but refused to follow them in this case, where a criminal charge is made. It is respectfully submitted that the United States and the Commissioner of Internal Revenue should follow decisions in civil cases in charging criminal liability, and in a criminal case it is certainly as important to preserve the rights of a citizen as in a civil case.

The Court below did point out, however, that at no time has the United States sought to impute any fraudulent purpose to petitioner in keeping his books on a fiscal year basis, and that there was confusion and uncertainty in the case (R. 518).

II.

The Court below erred in failing to hold that the Judge of the District Court erred in refusing to give the petitioner's proposed charges to the Jury, VIII, IX and X (R. 479-480).

Here, again, the District Court and the Court of Appeals failed to follow the decisions of the Circuit Court of Appeals in *Brooklyn City Railroad Company* vs. *Commissioner,* supra, and *Great West Printing Company* vs. *Commissioner,* supra.

The learned trial judge refused to put the very question of fact involved herein before the jury as requested by the petitioner in his requested instructions. The filing of a false return is the essence of the crime, if any. The trial judge, in his charge to the jury (R. 464) stated:

> "The guilt or innocence must be determined from his taxable earnings and the report filed thereon for the years 1944 and 1945, and not years prior nor subsequent thereto".

The returns filed by the Petitioner and in question here, covering two entirely different periods of time, were not mentioned by the trial judge in his charge to the jury. Petitioner requested and the court refused to give Instruction No. X (R. 479):

> "If you find that the defendant regularly kept his books and records on a fiscal year basis, ending July 31, for the years 1944 and 1945, but filed his Federal income tax returns for the years 1944 and 1945 on a calendar year basis, then the United States and/or Commissioner of Internal Revenue of the United States was without authority to compute defendant's net income or determine a deficiency in Federal income tax for the calendar years 1944 and 1945 and you must acquit him".

We must again respectfully emphasize that the Court of Appeals pointed out in its opinion that it was a mere

mistake not based on fraud, for the petitioner to file a calendar year return based on fiscal year computation (R. 518). The Court said (R. 519):

> "The *confusion and uncertainty* occasioned by appellant's own mistake in keeping the books of the Dothan Jewelry Company on a fiscal year basis, while his and his wife's joint return was made on a calendar year basis, was sufficiently explained and clarified by the evidence, so that the jury could arrive at the true facts." (Italics ours.)

It is respectfully submitted that the Court should have given the petitioner's proposed instructions VIII, IX and X to clarify the confusion and uncertainty in the computations which were emphasized by the Circuit Court of Appeals, itself. The very point made by the petitioner was not made clear to the jury by reason of the court's refusal to give the petitioner's requested charges. Much less confusion than is here involved resulted in a reversal of the conviction of the defendant in *U. S.* vs. *Hamilton Martell*, (CCA 3rd Cir.) (Nov. 6, 1952) 199 F. 2nd, 670 (certiorari denied).

It appears from this record that the representatives of the Commissioner of Internal Revenue used a period of seventeen months in computing income for the calendar year 1944 and likewise used a period of seventeen months in computing income for the calendar year 1945. This was done, as pointed out hereinabove, by combining fiscal year income reported by the petitioner with the calendar year income as determined by the representatives of the United States.

III.

The Court of Appeals erred by failing to hold that the District Court was in error by refusing to sustain petitioner's motions for judgment of acquittal on Count 1 and Count 2 of the indictment, because, the respondent's

own witness, E. B. McDaniel, Certified Public Accountant of Dothan, Alabama, testified that for the calendar year 1944, covered by Count 1 of the indictment, the petitioner had over-reported his income by the sum of $8,565.01 (R. 189, 190).

Since the income of petitioner was over-reported for the calendar years 1944, on the net worth basis, and the income was determined by respondent by adding the fiscal year income to the calendar year income, there is no basis to determine what petitioner's net worth was at the close of the calendar year, 1944, and therefore, there was no way of determining petitioner's income on a net worth and expenditure basis for the calendar year 1945, covered by count 2 of the indictment.

The decision of the court below, sustaining the district court in denying petitioner's motion for judgment of acquittal, is in conflict with the decision of the Court of Appeals for Eighth Circuit, in *Fenwick* vs. *United States* (1949), 177 F. 2nd, 274, *Hargrove* vs. *U. S.* (1933), 67 F. 2nd 820, and *Jones* vs. *U. S.* (1947), 164 F. 2nd, 398.

IV.

The Court below erred by failing to decide that the District Court was in error in disregarding petitioner's privilege against self-incrimination by admitting in evidence copies of petitioner's receipts and papers in possession of petitioner's attorney, Milton Weiss.

This issue involves an important and fundamental question of Federal law with respect to the rights of a defendant in a criminal case.

The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Baldwin* vs. *Commissioner of Internal Revenue*, 125 F. 2nd, 812, and the decision of the Court of Appeals

for the District of Columbia, in *Elliot* vs. *United States*, 23 App. D. C. 456.

V.

The Court below erred in failing to hold and decide that the complaint filed herein by the United States was invalid and therefore failed to extend the Statute of Limitations for indictment (See attached brief p. 39-41 as to validity of complaint).

The complaint was not offered in evidenec at the trial of the case but was submitted to the Court of Appeals by a supplemental record proffered by the Respondent (R. 505-7). Petitioner filed a motion to strike this Supplemental Record (R. 531-538).

It is respectfully submitted that the Court below erred in failing to pass upon petitioner's motion to strike the supplemental record of the United States covering the issuance of the complaint. It is further submitted that the District Court prejudiced the rights of the defendant on the entire case by submitting to the Jury Count 1 of the Indictment relating to the year 1944 when it had been shown by testimony of the United States that the petitioner had over-reported his income for the year 1944 and when under the evidence in the record at the trial the Count 1 was barred by the Statute of Limitations.

5.

SPECIFICATION OF ERRORS TO BE URGED

The Honorable Circuit Court of Appeals, erred:

I.

By failing to decide that the indictment covering the calendar years 1944 and 1945 was completely invalid as a matter of law because the books and records of the peti-

tioner's business were kept on a fiscal year basis whereas the alleged understatement of income was computed on the calendar year basis.

II.

By failing to hold and decide that the District Court erred in refusing to give to the jury instructions requested by petitioner.

III.

By failing to hold that the District Court erred by refusing to sustain petitioner's motions for judgment of acquittal as to both counts 1 and 2 of the indictment.

IV.

By failing to hold and decide that the District Court erred by disregarding the petitioner's privilege against self-incrimination by admitting in evidence copies of petitioner's receipts and papers in possession of petitioner's attorney, Milton Weiss.

V.

By failing to hold and decide that the District Court erred by denying petitioner's motions for judgment of acquittal on Count 1 of the Indictment because the testimony of the United States showed that on the net worth basis of computation, the petitioner had over-reported his 1944 income by the sum of $8,565.01.

VI.

By failing to hold and decide that Count 1 of the Indictment relating to the calendar year 1944 was barred by the Statute of Limitations.

WHEREFORE, it is prayed that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION

I.

The Indictment, in Two Counts, Covering the Years 1944 and 1945, Is Completely Invalid as a Matter of Law.

It is clear from the evidence in this case that the returns of the taxpayer were made upon a calendar year basis for both the years 1944 and 1945 (R. 26, 156, Gov. Ex. 1 and 2). It is also clear that the books of the Dothan Jewelry Company, the individual proprietorship of the defendant, were kept on a fiscal year basis throughout the years 1943, 1944 and 1945. Although petitioner filed calendar year returns, the income shown in the returns was on a fiscal year basis in accordance with petitioner's method of keeping books. The following is the testimony of government witnesses on this point.

McDaniels testified, (R. 193, 194)

> "Q. During these years, 1943, '44 and '45 on what basis, whether cash or accrual, were the books of the Dothan Jewelry Company kept?
> A. They were kept on a fiscal year basis, ending July 31, of each year, through July 31, '46 I believe, and after this examination began, since the time, since that time they have been kept on a fiscal year basis.
> Q. On the basis of accounting used, which basis did you use, cash or accrual?
> A. Accrual."

Special Agent, Martin, of Treasury Department, testified, (R. 383)

> "By Mr. Luce:
> Q. Mr. Martin, there are a few facts that I want to get clear about the year 1944. Were your audits in this case for the year 1944 made on the calendar year basis for each of the years 1944 and '45?
> A. Will you please read that question back? (the question was read.)

A. The audit, so far as the books of the Dothan Jewelry Company were concerned, was made from August 26, 1943 through July 31, 1944. That is the audit of the books was made. Again, we picked up and audited the books from August 1, 1944 through July 31, 1945, and again an audit of the books was made covering the period August 1, 1945, through July 31, 1946. And then the balance of the calendar year '46 from August 1, 1946 through December 31, 1946."

He further testified (R. 402-403):

"Q. Now, let me ask you this question, how did you say that the income was computed under the indictment in this case, count one, for the calendar year 1944, as they appear in the indictment?
A. That is the additional income?
Q. Well, the whole income; you don't set up the additional income in the indictment, you set up the whole income?
A. The whole income was computed by accepting the profits of the Dothan Jewelry Company as reported on a fiscal year basis, and adding to those profits the additional income as returned on a calendar year basis, since Mr. Pollock filed a calendar year return.
Q. Now, sir, you said just a moment ago that figures for 1944 were on a fiscal year basis, were they not, in the indictment?
A. They were on a fiscal year basis insofar as reporting income is concerned, but the return was filed on the calendar year basis.
Q. Now, for 1945, does the same situation prevail, that the figures in the indictment are on a fiscal year basis, although a calendar year return was filed?
A. Are you speaking of the indictment now?
Q. Yes.
A. This indictment?
Q. Yes, count two for the year 1945, is that the same situation as for 1944?
A. Well, the total—the aggregate net income for 1945 was determined by accepting the profits of the Dothan Jewelry Company on a fiscal year basis as reported on Mr. Pollock's 1945 income tax return,

> and by adding the additional income which was determined on a calendar year basis, that is the deposits that transpired between January 1, 1945, and December 31, 1945, and the currency expenditures for the same period."

It is without possibility of contradiction that the audit by the government agents used by respondent to obtain Count 1 of the Indictment, covers a period of time from August 26, 1943, to December 31, 1944. It is likewise certain, from the same evidence, that Count 2 of the indictment covers a period of time from August 1, 1944, to December 31, 1945, each being periods in excess of twelve months. No other possible conclusion can be reached from the government's testimony just quoted.

It is the position of the petitioner, that the examining officers of the Bureau of Internal Revenue erroneously computed the deficiency proposed and upon which the indictments are founded on a calendar year basis, by including in the audit and in the indictment, income reported in the income tax returns (Ex. 1 & 2) of petitioner and adding thereto income from an additional period of time ending December 31 for the respective years 1944 and 1945.

If the agents concluded that he calendar year basis was proper, then they should have computed deficiencies, if any, upon the calendar year basis only, instead of adding income for the calendar years to the income reported for the fiscal years. Here, they have failed to follow either of the correct methods provided in the Internal Revenue code.

The general rule for the computation of net income is found in Section 41 of the Internal Revenue Code, which provides:

"SEC. 41. GENERAL RULE.

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

Section 48 of the Internal Revenue Code defined the terms "taxable year" and "fiscal year" as follows:

"(a) Taxable Year.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable Year' means, in the case of a return made for a fractional part of a year under the provisions of this chapter or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made."

"(b) Fiscal Year.—'Fiscal year' means an accounting period of twelve months ending on the last day of any month other than December."

Prentice-Hall Federal Tax Service, 1952 Edition, Volume 1, Paragraph 6142 at page 6094 states:

"However the Commissioner cannot determine a deficiency on a basis other than that on which the books are kept if the taxpayer has an annual accounting period. In The Brooklyn City R. R. Co., et al., 27 BTA 77, affirmed (CCA-2), 72 F. 2d 274, 14 AFTR 428, where the taxpayer regularly kept its books on the basis of a fiscal year ending June 30 but made its return for 1921 on the calendar year basis, it

> was held that the Commissioner was without authority to compute net income, or to determine a deficiency, for the calendar year 1921. To the same effect: Charles E. Hires Co., 26 BTA 1351."

Under the aforesaid rule as expressed by Prentice-Hall Tax Service, the United States and/or the Commissioner of Internal Revenue had no right, civilly or criminally, to assert a deficiency in Federal income tax against this defendant for the calendar years 1944 and 1945. If there was any deficiency in tax due and owing from the petitioner, it was due and owing for the fiscal years ending July 31, 1944 and July 31, 1945 under the authority of the Prentice-Hall Federal Tax Service as quoted hereinabove. The indictment is based on an alleged deficiency or underpayment in tax for the calendar year 1944 (Count One) and a deficiency or underpayment in tax for the calendar year 1945 (Count Two). Accordingly the underpayments in tax alleged in the indictment for the calendar years 1944 and 1945 are erroneous and the indictment as to both Count One and Count Two is completely invalid.

The taxpayer's position in this case, as expressed hereinabove, has been well established by decisions of the Board of Tax Appeals (now Tax Court) in a number of cases and is recognized law. *W. E. Easterwood, Jr.,* 28 B.T.A. 1284, acquiesced in Cumulative Bulletin 1939-2, page 11.

The other pertinent decisions relied upon by the Board of Tax Appeals in the *Easterwood* case are as follows: *Duiron Company,* 18 B.T.A. 554; *Brooklyn City Railroad Company,* 27 B.T.A. 77; *Great West Printing Company,* 22 B.T.A. 346, affirmed by Court of Appeals, 8th Circuit, 60 F. 2d 749.

In the *Great West Printing Company* case, supra, the petitioner kept its books on a fiscal year basis ending

May 31. However the petitioner filed its returns on the calendar year basis. The Commissioner determined that the accounting was on a basis of a fiscal period, and determined that a deficiency on the fiscal year basis, which was affirmed by the Board of Tax Appeals.

If the examining officers of this case were of the opinion that a fiscal year basis should have been used, they should have determined the deficiencies on a fiscal year basis rather than combining fiscal and calendar year income.

In the *Brooklyn City Railroad Company* case, supra, the Commissioner determined the deficiency substantially on the same basis as the deficiency has been determined by the examining officers in this case; i.e., they computed a deficiency for the calendar years involved. The Board of Tax Appeals explained the case as follows in the opening paragraph of its opinion:

> "This is a proceeding for the redetermination of a deficiency in income and profits taxes determined by the respondent for the calendar year 1921 in the amount of $154,227.38. In the 'amended and supplemental petition' it is alleged that the respondent erred in his determination of the deficiency 'in that he has determined the income and excess profits tax without reference to the established fiscal year of The Brooklyn City Railroad Company and instead of determining the tax for the twelve months ending June 30, 1921, has based its determination upon the return filed by The Brooklyn City Railroad for the twelve months ending December 31, 1921, and asserted a deficiency for that period."

The Board of Tax Appeals held:

> "Where the taxpayer for many years prior and subsequent to 1921 regularly kept it books of account on the basis of a fiscal year ended June 30, although it made its tax return on the basis of the calendar year, *the Commissioner was without authority to com-*

pute net income, or to determine a consequent deficiency in tax, for the calendar year 1921. Great West Printing Co., 22 B.T.A. 346, followed." (Italics supplied.)

The decision of the United States Board of Tax Appeals in the *Brooklyn City Railroad Company* v. *Commissioner of Internal Revenue,* 27 B.T.A. 77, was affirmed by the United States Circuit Court of Appeals for the Second Circuit, 72 F. 2d 274.

In *Charles E. Hires Co.* v. *Commissioner,* 26 B.T.A. 1351, the Board of Tax Appeals reviewed the decided cases and held as follows:

> 1. Petitioner, keeping its books of account upon the basis of a fiscal year ended September 30, was required to file income-tax returns upon the fiscal year basis.
> 2. Petitioner filed its income-tax return for 1926 and prior years upon the calendar year basis. Respondent adjusted the return for 1926 and determined a deficiency for the nine-month period January 1 to September 30, 1926. Held, that in restating the account the respondent should have determined the deficiency upon the basis of its fiscal year ended September 30, 1926.

The government apparently realized the weakness of the indictment and the audit in this case, upon a calendar year basis, because several months later it obtained another indictment based on a fiscal year ending July 31, 1945, which indictment is still pending and untried in the district court for the northern district of Alabama (R. 14).

The court emphasized that there was no fraud on the part of the petitioner in keeping his books on a fiscal year basis and reporting fiscal year income in a calendar year return (R. 518). It is therefore clear that the Commissioner of Internal Revenue has no legal right to assert a deficiency in the Federal income taxes against petitioner, for the years 1944 and 1945, on a calendar year

basis when the petitioner's books were kept on a fiscal year basis. Especially was it unlawful and illegal for the representatives of the United States to couple or patch together a fiscal year income and calendar year income for a greater period than twelve months and determine a calendar year deficiency in taxes. The deficiency, if any, should have been determined upon a fiscal year basis pursuant to the decisions cited hereinabove, and the method by which the books were kept. Accordingly, the underpayment of taxes alleged in the indictment as to both counts, one and two, is completely invalid.

The income tax returns of petitioner were prepared and filed by his certified public accountants upon whom he had a right to rely. *Davis* vs. *Commissioner,* 184 F. (2d) 86 *Orient Investment & Finance Co.* vs. *Commissioner* (CADC) 166 F. 2, 601; *Haywood Lumber & Mining Co.* vs. *Commissioner* (CCA 2, 1950) 178 F. 2, 769 at page 771. On this point, the Court of Appeals (5th Circuit) had this to say respecting the filing of the returns (R. 517-518):

> "Previous to 1944, appellant and his wife had made their income tax returns on a calendar year basis. In August of 1943, the appellant purchased the Dothan Jewelry Company and thereafter operated that company throughout the years 1944 and 1945. He did not include any of the income from that company in his 1943 tax return. Notwithstanding that company was owned solely by the appellant, he mistakenly informed his accountants that it was a partnership in which he owned a two-thirds interest and his son, R. E. Pollock, a one-third interest. The government at no time has sought to impute any fraudulent purpose to that mistake, but has treated it as having been made in good faith. Acting upon the erroneous assumption of a partnership, the books of the Dothan Jewelry Company were kept upon a fiscal year basis for fiscal years

ending July 31, 1944, and July 31, 1945. The income tax returns of appellant and his wife purported to be for the calendar years 1944 and 1945 and were filed on March 15th of the succeeding year, but exhibits attached to the returns showed that as to the Dothan Jewelry Company, the net profit was calculated for a fiscal year ending July 31st. *The resulting confusion and uncertainty* has given rise to several of the appellant's contentions." (Italics ours).

It seems clear that this petitioner has been prosecuted as a result of mistakes and the confusion resulting from the combining of calendar and fiscal year income by the Government agents.

II.

The Court Committed Basic Error in Charging the Jury as to the Law Applicable to the Case and in Refusing to Give Instructions Requested by Petitioner.

The indictment charged, in both counts, that the defendant did "* * * attempt to * * * evade a large part of the income tax due and owing by him and his wife * * * *by filing and causing to be filed* * * * *a false and fraudulent joint income tax return on behalf of himself and his said wife* * * *" (R. 2).

The charge thus made is limited to an attempt to evade solely by filing a false and fraudulent income tax return. This is the essential element of the offense charged. *Guzik* vs. *United States,* (C.C.A. 7) 54 F. 2nd, 618.

Among several instructions requested by petitioner and refused by the trial court, are instructions VIII, IX and X (quoted supra p. 5; R. 479). Those three proposed instructions would clarify in the collective minds of the jury (U. S. vs. Martell, infra.) what the Court of Appeals (5th Circuit) calls "confusion and uncertainty" (R. 519).

The trial court gave a general instruction, as follows: (R. 461).

> "The elements of the offenses charged under both counts one and count two are in three numbers, namely, one, an attempt to evade and defeat the tax due; two, that the same was willfully done; and, three, that there is an additional tax owing.
>
> "With reference to the first element above mentioned, namely, an attempt to evade and defeat, the same may be inferred from conduct such as making false entries or alterations, destruction of books or records, concealment of assets, or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of that kind, and any conduct the likely effect of which would be to mislead or conceal. The willful filing of a false and fraudulent return constitutes an attempt."

The above quoted part of the charge given to the jury by the trial judge was patently erroneous and misleading in this case. In the light of the evidence quoted herein (supra, pp. 14-16), whether or not the court's charge as quoted is correct, as an abstract proposition of law, is beside the point. It had no place in this case because, in view of the evidence, it permitted the jury to infer the essential element, of an attempt to evade tax, from any one of the numerous things mentioned by the Court, or, indeed, from "any conduct the likely effect of which would be to mislead or conceal." That includes the audit of the government agents set out in the evidence quoted, which is manifestly incorrect and erroneous.

The effect of this charge without the instructions requested by petitioner was to erroneously state the law applicable to this vitally important element, and to refuse to charge the correct law applicable, as requested by the petitioner in his requested charges VIII, IX and X (R. 479).

This failure to give said instructions and correctly charge the law applicable as to an essential element in this case is a very fundamental error, and was markedly prejudicial to the defendant. It allowed the jury to find petitioner guilty on the errors and mistakes of the government agents. Such error calls for reversal of the judgment.

Jones v. *United States,* 164 Fed. (2d) 398, Circuit Court of Appeals, Fifth Circuit, 1947, was a prosecution for income tax evasion. The trial court failed to properly charge the jury as to the law applicable to the case. Jones was convicted. Upon appeal by the defendant, this Court reversed, speaking in part as follows:

> "In addition, the judge, instead of instructing the jury in terms precisely appropriate, in the light of the governing law, to the offense charged, gave a charge which wholly failed to do this, and also refused to give defendant's requested instructions in which his contentions and defenses were carefully and, in substance, correctly set out.
>
> • • • •
>
> "In the light of these pronouncements, it is quite plain that the theory on which the cause was tried below, that defendant's failure to return the income, knowing that it was due, of itself made out a case which he was required to rebut, was a wholly incorrect one and that the judgment must be reversed and the cause remanded for further and not inconsistent proceedings."

Hargrove v. *United States,* 67 Fed. (2d) 820, Circuit Court of Appeals, Fifth Circuit, 1933, a prosecution for income tax evasion, holds in accord with the *Jones* case. There, this Court, in reversing the conviction, said in part (pages 823-824):

> "Defendant's requested charge contains some inaccuracies, some inadvertences. It, however, sufficiently called the court's attention to the law of the case; the refusal to charge its substance was error."

The error committed was such as to affect a substantial right of the defendant. In *Thomas* v. *United States,* 151 Fed. (2d) 183, Circuit Court of Appeals, Sixth Circuit, 1945, the indictment charged the defendant with conspiracy to violate the Federal Espionage Act. In its charge, the trial court charged the jury as though the defendant were charged with a violation of the Espionage Act, not limiting his charge to the conspiracy offense which the indictment set forth. In reversing conviction of the defendant, on account of this error, the Sixth Circuit Court of Appeals spoke in part as follows (page 186):

> "This was clear error. The sole crime ascribed to appellant in the indictment was that of conspiracy. These errors in the charge compel a reversal if it affirmatively appears that they affected some substantial right of the appellant. Title 28, Sec. 391, U.S. C.A.; Simpson v. United States, 9 Cir., 289 F. 188, 191; Haywood v. United States, 7 Cir., 268 F. 795. *It is well settled that appellant had a right to a correct statement of the law from the court.* It is of course the duty of the court to explain the law of the case to the jury. Bird v. United States, 180 U.S. 356, 361, 21 S. Ct. 403, 45 L. Ed. 570." (emphasis added)

See, also, *Coleman* v. *United States,* 167 Fed. (2d) 837, Circuit Court of Appeals, Fifth Circuit, 1948, where the Court reversed a conviction for using the mails to defraud, in part upon the ground that the trial court charged the jury as to law which was correct, but which was inapplicable to the charge made by the indictment. This Court said, in part (page 840):

> "This is good law, but it is not applicable to this case, since the indictments were based upon the alleged fact that the letters sent out were false and known by the appellants to be so."

This error in the charge was not corrected in any other portion of the charge. The unduly broad definition by

the trial court as to what might be held to constitute an "attempt to evade" (R. 461) colored all subsequent portions of the charge. The error was of such a basic nature that only a clear and specific correction of it could have saved the defendant from serious prejudice. That correction was never made. In such situation, the charge cannot be deemed to be correct. At best, it was inconsistent and confusing to the jury; it surely did not give the defendant that clear statement of the applicable law to which he was entitled. The error was not cured by the court, and such error is such as to call for a reversal of the judgment of conviction. *Bishop* v. *United States,* 16 Fed. (2d) 406, Circuit Court of Appeals, Eighth Circuit, 1926.

Also in view of the testimony set out above and the the law, as quoted, the jury could not possibly arrive at the true facts. The jury had before it audits that covered periods of time in excess of the calendar years mentioned in each count of the indictment.

The Court of Appeals (5th Circuit) stated, with respect to this (R. 519):

> "The *confusion and uncertainty* occasioned by appellant's own mistake in keeping the books of the Dothan Jewelry Company on a fiscal year basis, while his and his wife's joint return was made on a calendar year basis, was sufficiently explained and clarified by the evidence so that the jury could arrive at the true facts.
>
> "* * * The United States had made *various computations,* some following the mixed calendar year-fiscal year system originated by the taxpayer. *Those computations and that confusion* were no cause for requiring the jury to acquit the appellant if they believed from the evidence beyond a reasonable doubt that he was guilty as charged" (Italics supplied).

If any one of the "various computations" mentioned by the court of appeals is erroneous the verdict of the

jury must be illegal and void. It is certain from the evidence quoted above (p. 14-16 supra) that the government's computation of the income for each of the two years, 1944 and 1945, was erroneous and improper, and it was grievous error to refuse to give instructions VIII, IX and X (supra) when the "confusion" and uncertainty mentioned is so well established. In a recent case, *U. S.* vs. *Martell,* (CCA 3) 199 F. 2nd, 670, the Court of Appeals for the Third Circuit, states:

> "A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable. A conviction cannot be sustained unless this state of mind is supported by the evidence and explained to the jury."

The trial court's judgment of conviction was reversed and the Government's petition for certiorari was denied.

It is the burden of the government to prove that the returns filed by the petitioner are false and fraudulent. The learned trial judge refused to put the very question of fact involved herein before the jury as requested by the petitioner (R. 479). The trial judge, in his charge to the jury stated:

> "The guilt or innocence must be determined from his taxable earnings and the report filed thereon for the years 1944 and 1945, and not years prior nor subsequent thereto". (R. 464).

The trial judge overlooked the facts shown in the testimony of the government's witnesses quoted above (p. 14-16) which evidence establishes wholly different periods of time for the jury's consideration, than those mentioned by the trial judge. The jury could not be informed and instructed correctly by the court with respect to that testi-

mony unless the court gave petitioner's requested instructions VIII, IX and X, which the court erroneously refused to give.

III.

Petitioner's Motions for Judgment of Acquittal as to Both Counts 1 and 2 of the Indictment, Should Have Been Sustained.

Count 1 of the indictment charges that the petitioner reported a net income of $19,503.49 for the calendar year 1944 and that he very well knew that the correct net income for the calendar year 1944 was $32,983.92 (R. 1, 2) a charged understatement of income in the amount of $13,840.43.

For the calendar year 1944 the defendant reported a net income of $19,503.49 (Count One Indictment, R. 1 and 2, Government Ex. 1, admitted R. 24, Government Exhibit 32, admitted R. 177; R. 168, 190). Government witness, E. B. McDaniel, Certified Public Accountant of Dothan, Alabama, testified that for the calendar year 1944 the defendant reported on his Federal income tax return a net income of $19,503.49 and that by computing income on the net worth basis for the calendar year 1944 the defendant overreported his income for the calendar year 1944 by the sum of $8,565.01 (R. 189, 190, Government Exhibit 32).

At the trial of the case the special agent for the Treasury Department, Mr. Martin, computed a corrected net income of the defendant of $24,205.98 for the calendar year 1944, an alleged understatement of $4,702.49 (R. 332). In determining this corrected income, the agent computed the deposits of the defendant in his personal bank account as $10,272.53 (R. 331). After eliminating $8,222.53 as income definitely identified as being reported, the agent arrived at a figure of $4,702.49 which he claimed

to be unidentified deposits and reached the conclusion that this sum constituted an understatement of income (R. 332). He then added this figure of $4,702.49 to the reported income for the calendar year 1944 of $19,503.49 and thus reached his corrected net income of $24,205.98 (R. 332).

However, the examining officer for the Government, in making his calculations, grievously erred by failing to give the defendant any credit for income received by him in 1943 which the defendant had erroneously reported on his return for the calendar year 1944 as calendar year 1944 income. The record shows that in his return for the calendar year 1944 the defendant erroneously reported as calendar year 1944 income the sum of $18,516.14 which money he had made during the year 1943 in operating the Dothan Jewelry Company for the period August 26, 1943 to December 31, 1943 (R. 388).

Under cross-examination the Government witness, Martin, admitted that although he added the figure of $4,702.49 to the reported income for the calendar year 1944, he gave the taxpayer no credit for the $18,516.14 of 1943 income which was erroneously included by the taxpayer in his return for the calendar year 1944 as income for said calendar year. (R. 388-389)

Thus we have in this case the testimony of the Government witness E. B. McDaniel that on the net worth basis the defendant overreported his income for the calendar year 1944 by the sum of $8,565.01 and we have the admission of the Government witness Martin that in computing the deficiency in income of $4,702.49 for the calendar year 1944 he failed to give the taxpayer credit for calendar year 1943 income which was included by the taxpayer in his 1944 return to the extent of $18,516.14. Furthermore the method by which the Revenue Agent Martin arrived at his alleged deficiency in income of $4,702.49

is far from clear. He did not resort to the net worth method. If he had, he would have arrived at an overstatement of income of $8,565.01, as reached by the Government witness McDaniel. The Government Agent Martin did not contest or attempt to rebut the figures of Mr. McDaniel on the net worth basis for the calendar year 1944.

The evidence in this case was clearly insufficient to make out a prima facie case against the defendant and the case should not have been submitted to the Jury. *Bryan* v. *United States* (CCA 5, 1949) 175 F. 2nd, 223; *Fenwick* vs. *United States* (CCA 7, 1949), 177 F. 2nd, 488. As shown hereinabove (pp. 14-16) the Government's own evidence in this case demonstrates that the taxpayer had over-reported his income for the calendar year 1944, at least to the extent of $8,565.01. The over-reporting of income for 1944 by petitioner and the coupling together by respondent of the fiscal year income and the calendar year income of petitioner (R. 189, 190, 332, 388, 389) for the year 1944 (pp. 14-16 supra) destroyed any possible basis for determining a deficiency for the calendar year of 1945 on a present worth and expenditure basis, so that the law as determined and the doctrine announced in *Bryan* vs. *U. S.* (supra) applies with even greater support in this case than in the Bryan case.

In order to establish an income on present worth or expenditure basis for 1945 the government would have to know and the evidence would have to show what petitioner's present worth was at the close of the preceding calendar year (Dec. 31, 1944). Petitioner having over reported his income for 1944 on a calendar year basis and the government having coupled his income for the fiscal year ending July 31, 1944, with the calendar year income of 1944, which determination was erroneous, according to the testimony above set out (pp. 14-16), there are no figures in the record upon which the present worth

of petitioner, as of December 31, 1944, can be determined. The government not having basic net worth figures at the beginning of 1945, petitioner's income could not be determined for that year on a net worth and expenditure basis.

Accordingly, the Court below erred in not granting the petitioner's written motion for a judgment of acquittal (R. 483-485); the petitioner's oral motion for a judgment of acquittal made after the government rested (R. 444); the renewed motion for a judgment of acquittal (R. 467); the motion of defendant for a new trial (R. 485) and the motion of defendant for an arrest of judgment (R. 487).

The Court of Appeals for the Fifth Circuit erred in affirming the trial court in overruling said motions.

IV.

The Court of Appeals Committed Error in Affirming the Action of the Trial Court in Admitting Copies of Papers Which Were in the Possession of His Attorney, Milton Weiss.

The trial court, over the petitioner's objection, admitted a copy of a receipt, the original of which had been given by the petitioner's attorney to the petitioner (Government Exhibit 22; R. 124-125); said receipt was for $11,500. currency. The objection of the petitioner (R. 125-126) was full and explicit, and pointed out to the court the precise legal ground making such exhibit inadmissible in evidence. Petitioner's counsel further moved to strike Government Exhibit 22 from the Record (R. 126).

Over similar objection, the trial court admitted another like copy of a receipt for $10,000., given to the petitioner by his attorney (Government Exhibit 23; R. 127).

At the conclusion of the testimony of Milton Weiss, attorney for the petitioner, petitioner's trial counsel

moved to strike said exhibits, detailing specifically the precise legal ground making said Exhibits inadmissible in evidence (R. 141-143).

These rulings by the court constituted clear error.

Balter on *Fraud under Federal Tax Law,* Section 145, at page 242, was cited to the trial court (R. 141). Said authority speaks in said section in part as follows (page 242):

> "Where the client is on trial on criminal charges, since the client's books and records in his possession could not be ordered produced at the trial, neither may the prosecution order the attorney to produce any books, records, or documents left in his custody by the client; * * *".

Mr. Balter cites VIII Wigmore on Evidence, Third Edition, Sections 2307 and 2308, in support of the proposition. This authority, in section 2307, treats the subject in full detail. Wigmore there states, in part (page 592):

> "It follows, then, that *when the client himself would be privileged* from production of the documents, * * * as exempt from self-incrimination, the attorney having possession of the document is not bound to produce; and such has invariably been the ruling."

In footnote 1 on said page, Wigmore collects many cases illustrating the rule.

The applicable rule was succinctly stated in *Bough* vs. *Lee,* 29 Fed. Supp. 498, District Court, Southern District of New York, 1939 where the court said (pages 501-502):

> "An attorney is obliged to produce in answer to a subpoena, such documents as his client could have been compelled to produce."

The rule is fully applicable to copies of documents of the client, in the possession of the attorney; that is, if the client could not be compelled to produce the original document, because of privilege, then the attorney cannot

be compelled to produce the copy. *Ex parte Snow,* 75 N.H. 7, 70 Atl. 120, Supreme Court of N.H., 1908.

~~The error of the trial court considered in this Point is closely related to the erroneous admission of the testimony of Milton Weiss, detailed in Point IV supra, pages 26-30.~~

These errors were prejudicial, as they directly nullified the petitioner's privilege against self-incrimination, and the priivlege of the petitioner as to matters learned in confidence by his attorney, Milton Weiss. As more fully treated in Point IV, supra, at pages 26-30, these errors related to the vitally important net worth increase phase of the case. The petitioner submits that a conviction gotten through such direct breaches of the fundamental rights of the petitioner, as to admission of evidence, should not be sustained.

V.

Count One of the Indictment Should Not Have Been Submitted to the Jury, Because: (a) Petitioner Over-reported His Income for 1944; (b) Count One Was Barred by the Statute of Limitations.

(a) It was prejudicial and against the interest of petitioner for the District Court to submit Count 1 of the indictment to the jury for its consideration, and the Court of Appeals for the Fifth Circuit erred in affirming the action of the District Court in so doing.

It is clear from the evidence discussed under Point III (supra, pp. 28-30; R. 193, 194; 388, 389), that from the Government's own testimony, petitioner over-reported his income tax for the year 1944 and having so done, it was prejudicial error to permit the jury to consider the charge set out in Count 1.

(b) Count One of the Indictment Relating to the Calendar Year 1944 Was Barred by the Statute of Limitations.

The return of the petitioner for the calendar year 1944 was filed and received by the Collector of Internal Revenue for the District of Alabama on the 15th day of March, 1945 (R. 20, Government Ex. 1). The indictment was filed in open court in the District Court of the United States for the Northern District of Alabama, Southern Division, on the 13th day of April, A. D. 1951. Section 3748 of the Internal Revenue Code, with respect to the statute of limitations, provides as follows:

> SEC. 3748. PERIODS OF LIMITATION.
>
> (a) Criminal Prosecutions.—No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, or a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the persons authorized or required to present such return, affidavit, claim, or document).
>
> For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or

the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

(b) Scope of Limitations.—Subsection (a) of this section shall apply to offenses whenever committed; except that it shall not apply to offenses the prosecution of which was barred before June 6, 1932.

Since the return of the petitioner for the calendar year 1944 was filed on the 15th day of March, 1945 and the indictment was not filed until the 13th day of April, A. D. 1951, Count One of the indictment is barred under the aforesaid Section 3748 of the Internal Revenue Code. More than six years expired from March 15, 1945 until April 13, 1951. At the time the indictment was filed, any prosecution of the petitioner with respect to the calendar year 1944 was barred by the statute of limitations.

Respondent attempted to meet the issue as respects the Statute of Limitations by filing, on November 6, 1952, a supplemental record (R. 504-513), which shows a complaint and warrant against petitioner, filed before an U. S. Commissioner, which was not introduced in evidence or made a part of the record at the trial. The petitioner had filed, on September 4, 1952, a full and complete transcript and record of all the proceedings in the trial. On December 12, 1952, petitioner filed his Motion to Strike the supplemental record (R. 531-538). The Court of Appeals did not act or pass upon the petitioner's Motion to Strike.

Rules 7 and 9 of the Federal Rules of Criminal Procedure point out when an indictment and information are to be used with respect to prosecution.

Rule 7(a) of the Federal Rules of Criminal Procedure describes when indictment is to be used, and when an information can be used. It provides: "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment by a term exceeding one year * * * shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. * * *"

Rule 7(c) provides in part: "The indictment on the information shall be a plain * * * statement of the essential facts * * *. It shall be signed by the attorney for the Government."

Under Rule 9, the information must be verified by the United States attorney, before the court will issue a warrant for the arrest of the defendant.

Official Form No. 11 shows the form of an information, and that it is to be signed by the United States Attorney.

In this proceeding no information was filed against the petitioner and the indictment was filed in open court in the District Court of the United States for the Northern District of Alabama, Southern Division on the 13th day of April, A.D. 1951 (R. 1), more than six years after the return of petitioner was filed for the calendar year 1944, to wit: on the 15th day of March, 1945 (R. 20, Government Exhibit 1).

The attention of the Court is respectfully directed to the fact that Section 3748 of the Internal Revenue Code provides for prosecution either by indictment or information. We think that it is apparent from a reading of Section 3748 of the Internal Revenue Code and Rules 7 and 9 of the Federal Rules of Criminal Procedure that

an information may be used under Section 3748 of the Internal Revenue Code for the prosecution of a misdemeanor. However, under the Federal Rules of Criminal procedure an offense which may be punished by imprisonment by a term exceeding one year "shall be prosecuted by indictment" or if the indictment is waived, it may be prosecuted by information. Petitioner was prosecuted for a felony under Section 145(b) of the Internal Revenue Code (26 U.S.C. 145(b)), (R. 1):

> "(b) Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Accordingly under Rule 7(a) of the Federal Rules of Criminal Procedure, it was incumbent upon the United States to prosecute the appellant by indictment unless the indictment is waived. The indictment was not waived and in fact there was no information issued, as the record discloses. Accordingly, since under the Federal Rules of Criminal Procedure the petitioner "shall be prosecuted by indictment," the case of the United States falls because the indictment was filed too late.

There is no statutory authority for the extending of the statute of limitations for the filing of an indictment charging a felony by the filing of an information or a complaint. That part of Section 3748 of the Internal Revenue Code which refers to complaints is as follows:

> "For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U.S.C., Title 18, Sec. 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district."

The above quoted section of the statute refers to the filing of a complaint before a commissioner but the filing of a complaint is limited to conspiracy cases where the conspiracy involves an attempt in any manner to evade or defeat a tax.

No conspiracy was alleged or proved in this case and petitioner was not indicted for a conspiracy. He was indicted for a felony under Section 145(b) of the Internal Revenue Code and it is submitted that a timely indictment was required.

Furthermore the complaint, (R. 508) as it appears in the supplemental record filed by respondent was defective and was insufficient either for purposes of prosecution under the complaint itself or to extend the statutory period of limitations for indictment for a felony and does not meet the requirements of the Fourth Amendment to the Constitution of the United States. The complaint was not signed or filed by the United States Attorney for the Northern District of Alabama. If the said complaint had been filed by the United States Attorney for the Northern District of Alabama it may have been valid under *Albrecht* v. *United States*, 47 S. Ct. 250, 273 U. S. 1.

"Under the Fourth Amendment, a defendant may not be tried on an information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. U. S. C. A. Const. Amend. 4."

"A federal court has no jurisdiction to direct the issuance of a warrant on an information filed, made on the information and belief of a federal officer alone, and the information must be supported by legal evidence that a crime has been committed and that there is probable cause to believe defendant guilty of the commission thereof. U.S.C.A. Const. Amend. 4."

United States v. *Kennedy,* District Court, District of Colorado (May 27, 1946) 5 Federal Rules Decisions 310, and cases cited therein, including United States v. Morgan, 222 U. S. 274.

The Supreme Court in *United States* v. *Morgan,* 222 U. S. 274, at page 282, 32 S. Ct. 81, 82, 56 L. Ed. 198, says:

"A further answer is, that as to this and every other offense, the 4th Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of someone having knowledge of facts showing the existence of probable cause." See also *United States* v. *Thompson,* 251 U. S. 407, at page 414, 40 S. Ct. 289, 64 L. Ed. 333.

In *United States* v. *Baumert,* D. C., 179 F. 735, 738, the court passes squarely on the point, holding under the Fourth Amendment a Federal court "has no jurisdiction to direct the issuance of a warrant on an information filed, made on the information and belief of the United States attorney alone. It must be supported by proof establishing probable cause; that is, by legal evidence that a crime has been committed and that there is probable cause to believe the accused guilty of the commis-

sion thereof." Citing Hughes on Federal Procedure, p. 43, as follows: "A complaint to justify an information must show personal knowledge and probable cause."

The complaint was signed by one J. B. McCaslin who designated himself as special agent. The affidavit of McCaslin does not set forth the fact or facts showing that he had personal knowledge of the facts showing the existence of probable cause in this case. The affidavit states: "And the complaintant further states that he believes that Special Agent James A. Martin, Montgomery, Alabama, ———— are material witnesses in relation to this charge."

Mr. McCaslin did not appear as a witness in this case as the record shows. James A. Martin did appear as a witness but he did not sign any affidavit in connection with the complaint. If the complaint had been offered in evidence at the trial of this cause (or originally sought to be made a part of this record) counsel for the petitioner would have objected on the very grounds hereinabove set forth.

No part of the supplemental record was offered as an exhibit or presented to the court at the trial of the case. A search of the transcript finds no part of it. Therefore, there was nothing before the trial court upon which that court could base the order (R. 505-6) which was made part of the supplemental record. This type of effort has been before the courts, and the courts have decided that Rule 75(h) does not allow such a supplemental record. In the case of *Kennedy* vs. *U. S.* (CCA. 1940) 115 F. 2d, 624, the court said:

> "Rule 75(h) gives to a district court and to this court power to correct the record only as to 'what occurred in the District Court', not to add to or cause to be added to the record findings which were never made".

In the case of *Heath* vs. *Helmich,* 173 F. 2d, 156, in an attempt to get evidence in by stipulation signed by the parties, under Rule 75(h), the court said:

> "It appears that none of these last documents were ever offered in evidence either before the Referee who determined the case or the district court.
>
> "The cause must be tried here upon the record made at the original trial. The rule cited has not for its purpose the introduction of new evidence, even by stipulation, but only corrections of the record to conform to the truth by elimination of omissions and misstatements. A trial before a referee or district court would be a nullity if the record could be so changed here. Likewise substantial injustice might be done to a litigant."

The effort of the government to correct the record under rule 75(h) is restricted to those matters before the court below at the trial. Any supplemental record including documents which had never been offered in evidence at the trial should be stricken. In the case of *Dempsey* vs. *Guaranty Trust Co.* (Ill.) 131 F. 2d, 103, the Court said:

> "The rule, however, was never intended to admit the addition of matter not before the court when he entered the order."

To the same effect, see *Sonken-Galomba* v. *Atchison T & S Ry. Co.* (Mo)36 F. Supp, 909.

> Appellant's motion to strike is the proper proceeding since the appellate court has power to correct the record before it by excluding any part of the record.
>
> *Pritchard vs. Nelson* (Va.) 137 F. 2d, 312.

Rule 75(h) of the 5th Circuit Court of Appeals is the same as Rule 75(h) of the Rules of Civil Procedure, 28 U.S.C.A. p. 450. That rule provides:

> "If any difference arises as to whether the record truly discloses what occurred in the district court,

> the difference shall be submitted to and settled by that court and the record made to conform to the truth".

A complete transcript of the record of the District Court was filed on September 4, 1952. The respondent filed no motion and took no action with respect to correcting the record under rule 75(h). That rule further provides:

> "If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court on proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected."

There was no "omission or misstatement" as respects the supplemental record which the respondent has filed. The fact is that the contents of supplemental record were never presented to the trial court or offered in evidence in this case.

The supplemental record is before this court entirely upon the order issued by the trial judge, likely at the request of the respondent without notice to the petitioner, and without any complaint being made as respects the correctness of the transcript and record filed by petitioner. It, therefore, was an exparte proceeding. Rule 75(h) contemplates a controversy between the parties. *Treasure Imports Inc.* vs. *Henry Amdur & Sons, Inc.* 127 F. 2d. 3. In *Dempsey* vs. *Guaranty Trust Company,* 131 Fed. 2nd 103 the Court said "The rule, however, was never intended to permit the addition of matter not before the District Court when he entered the order."

The courts have held that exparte matter changing the record or amending it is not permissible. It was held in *Gray* vs. *Amerada Petroleum Corporation,* 145 F. 2d, 732,

> "A mere exparte statement filed months after the judgment is no part of the record and can not be considered on appeal."

In this case, the complaint before the Commissioner as copied into the appellee's supplemental record, was not before the trial court. The supplemental record shows on its face (R. 505-7) that it is an exparte act on the part of the Appellee.

CONCLUSION

It is therefore respectfully submitted that the Court of Appeals (5th Circuit) erred in the respects herein set out, and for the reasons stated herein and in the foregoing petition, a writ of certiorari should be granted.

Respectfully submitted,

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